

MONTGOMERY COUNTY, STATE OF MARYLAND

Potowmack Preserve, Inc.	:	
	:	COMMISSION ON COMMON
	:	OWNERSHIP COMMUNITIES
Complainant	:	Case No. 720-G
	:	
vs.	:	Panel Hearing Date: March 19, 2008
	:	Decision Issued: June 13, 2008
Peter Ball and Iryna Sivinska,	:	
	:	
Respondents	:	
	:	
Panel McCabe, Huggins and Negro	:	
	:	
Panel Chair Memorandum By: John F. McCabe, Jr.	:	
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Peter Ball	:	COMMISSION ON COMMON
	:	OWNERSHIP COMMUNITIES
	:	
	:	Case No. 33-06
Complainant	:	
	:	Panel Hearing Date: March 19, 2008
vs.	:	Case No. 33-06
	:	Decision Issued: June 13, 2008
Potowmack Preserve, Inc.	:	
	:	
Respondent	:	
	:	
Panel McCabe, Huggins and Negro	:	
	:	
Panel Chair Memorandum By: John F. McCabe, Jr.	:	

MEMORANDUM DECISION AND ORDER

The above captioned cases came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended. The cases were consolidated for the

purpose of hearing and decision. The duly-appointed Hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

BACKGROUND

Case No. 720-G, filed by Potowmack Preserve, Inc., a Maryland homeowners association, against two of its members, Peter Ball and Iryna Sivinska raises two issues:

1. Whether the Respondents' construction of an enclosed room addition to their home, which was not approved by the Complainant, instead of construction of a wood deck with shed roof on both sides of the house, which was approved by the Complainant, violates the Complainant's governing documents.

2. Whether the Respondents' actions, including an alleged long history of materially deviating from approved architectural change applications, authorizes the Complainant to prohibit the Respondents from initiating any new construction projects on their property for 24 months.

The Complainant Potowmack Preserve, Inc. requests the Panel to issue an order requiring Respondents to dismantle and remove the unauthorized structure and to restore their property to its original pre-construction condition, and to issue an order prohibiting Respondents from initiating any new construction projects on their property for 24 months.

Case No. 33-06, filed by Peter Ball against Potowmack Preserve, Inc., raises the following issue:

Whether the increase in annual assessments adopted by the Board of Directors of Potowmack Preserve, Inc. to become effective for fiscal year 2006 was done in violation of Article V, Section 5.(a) of the Declaration of Covenants governing the association.

The Complainant, Peter Ball raised two additional issues in his Complaint, but those

issues were abandoned at the hearing. The Complainant in Case No. 33-06 requests that the Panel issue an order requiring the Board of Directors of Potowmack Preserve, Inc. to reduce the 2006 annual assessment to \$70.00 per home per year.

The pertinent part of Article V, Section 5(a) states:

“Section 5. Increase in Maximum Assessment.

- (a) From and after January 1, 1971, in any event, the maximum annual assessment and the maximum initial assessment for all Class A Memberships shall be increased by the Board of Directors of the Association, without a vote of the membership, by the percentage of increase, if any, of the United States Department of Labor Cost of Living Index for the Washington D.C. Metropolitan Area during the preceding year, provided, however, that the maximum assessments shall not be decreased by any decrease in the aforementioned Index.”

FINDINGS OF FACT

1. Potowmack Preserve, Inc. is a homeowners association within the meaning of the Maryland Homeowners Association Act, Title 11B, Real Property, Annotated Code of Maryland. After Case No. 720-G was filed, Potowmack Preserve, Inc. changed its name from “The East Gate Homes Association, Inc.” to “Potowmack Preserve, Inc.”. Potowmack Preserve, Inc. is a community of 159 homes. The community is approximately 30 years old. There are five separate models in the community with distinctive architectural styles.

2. Peter Ball and Iryna Sivinska are owners of property subject to the governing documents of Potowmack Preserve, Inc. located at 10600 Vantage Court. They are members of Potowmack Preserve, Inc.

3. Pursuant to Article V, Section 5(a) of the Potowmack Preserve, Inc. governing documents, Commission Exhibit 1 at Page 57, the Board of Directors of Potowmack Preserve,

Inc. unanimously voted to increase the annual assessment from \$70.00 per year to \$88.93 per year for fiscal year 2006.

4. The Board of Directors did not increase the actual annual assessment or the maximum annual assessment for the fiscal years 2000 through 2005. The annual assessment in the year 2000 was \$70.00. Had the Board of Directors increased the maximum annual assessment each year in accordance with the formula contained in Article V, Section 5(a), then the total increase for all of those years as of April 2006 would have been approximately \$19.00.

5. Respondent Peter Ball contends that the assessment increase for 2006 should be limited to the increase in the CPI for 2005. This would result in an increase of approximately \$2.60, making the assessment for fiscal year 2006 approximately \$72.60.

6. Peter Ball called Lance Pelter, a resident of Potowmack Preserve, Inc. for over 20 years who had also served as an officer and Board member of the association. Mr. Pelter described the process for setting the annual assessments while he was on the Board. The Board would take two votes. First the Board would set the maximum annual assessment. Then the Board would set, by a second vote, the actual assessment to be charged for the fiscal year in question. This was the procedure following by the Board for implementing Article V, Section 5(a) of the Covenants until 2000.

7. On or about May 27, 2003 Respondent Peter Ball filed an application with the Architectural Control Committee of Potowmack Preserve, Inc. to “build a wood deck with shed roof on both sides of house; enclosed lower portion of the addition.” Commission Exhibit 1 at Page 11.

8. The Architectural Control Committee of Potowmack Preserve, Inc. approved Mr.

Ball's application on July 22, 2003. Approvals are effective for 24 months. The change must be completed within those 24 months.

9. Peter Ball did not construct the exterior architectural change approved. Rather on or about March 11, 2004 he built a single fully enclosed above-ground addition on the north side of his house. This addition has no entry to the main house; it is unheated and accessible only from the outside.

10. On or about March 17, 2004 Peter Ball filed another application for approval of exterior architectural change. In this application he requested permission to "convert approved 2 side decks with roof to 2 enclosed rooms." Commission Exhibit 1 at Page 20; Complainant's Exhibit 6. The Architectural Control Committee denied this application on May 12, 2004. Complainant's Exhibit 10.

11. At the time that Peter Ball filed the second application on March 17, 2004, he had substantially completed the enclosed addition for which he was then requesting approval from the Architectural Control Committee.

12. On January 15, 2008 Peter Ball submitted another application to the Architectural Control Committee for approval of a proposed addition to his property. He supplemented that application on January 29, 2008 with an offer to submit samples of materials to be used in the proposed addition.

13. The Architectural Control Committee of Potowmack Preserve, Inc. denied Peter Ball's January 15, 2008 application on February 26, 2008. That denial is now the subject of a lawsuit in the Circuit Court for Montgomery County, Peter Ball and Iryna Sivinska vs. Potowmack Preserve, Inc., Case No. 293510 V.

14. Potowmack Preserve, Inc. presented the testimony of Jeffrey Ross Williams, a resident of the community, a Board member and the current co-president of the association. Mr. Williams testified that the May 27, 2003 application for two decks, approved July 22, 2003, Complainant's Exhibit 3, expired, by its terms, within 24 months. That would be by July 22, 2005. He also confirmed that the March 17, 2004 application for an addition was denied. Complainant's Exhibits 6 and 10. As a consequence of those actions, at the time of the hearing on March 19, 2008 Respondents had no approvals from Potowmack Preserve, Inc. for any of the architectural changes they had made to their property since May 27, 2003.

15. Raj Barr, a current Board member of Potowmack Preserve, Inc. and its co-president, and a practicing architect for 35 years, testified regarding the character of the addition constructed by Respondents. He stated that the construction was not a deck. Peter Ball admitted this in his own testimony. Mr. Barr also stated that the construction, in his opinion, was never meant to be a deck. He stated that the construction does not meet the County standards for a deck, and that it is not built of materials that would withstand the outdoor elements. Consequently, in his opinion, the structure could not be readily converted to a deck, as proposed by Peter Ball to Potowmack Preserve, Inc. on various occasions.

16. Peter Ball admitted that he is not in compliance with the governing documents of Potowmack Preserve, Inc. He stated that while he was implementing the July 22, 2003 approval, some time in March 2004, he decided that he needed a room more than a deck. Therefore he built a room.

17. Peter Ball presented the testimony of William Hancock, a gentleman who has

been a design builder for 40 years. Mr. Hancock characterized the structure built by Mr. Ball as a “storage shed.” Mr. Hancock testified that he had reviewed on line the original permit from Montgomery County for the structure. That permit was for a “deck.”

18. Mr. Ball testified that he could remove within one-half day the architectural changes to his property constructed since May 27, 2003.

19. Potowmack Preserve, Inc. adopted the Architectural Design Guidelines in late 2004 or early 2005. Complainant’s Exhibit 19. Those guidelines apply to any architectural change requested after their adoption.

20. Counsel for Potowmack Preserve, Inc., Corrine G. Rosen, submitted a statement for legal services pursuant to Article VIII, Section 9 of the Potowmack Preserve, Inc. By-laws. Complainant’s Exhibit 24. The total requested is \$3,875.15 through the March 19, 2008 hearing. Ms. Rosen is an attorney who has represented a number of community associations and individuals before the Commission. The hourly rate that she charged Potowmack Preserve, Inc. is \$125.00 per hour. Of the time shown on Complainant’s Exhibit 24, arguably at least five hours relate to Case No. 33-06 and/or the recent Circuit Court action filed by Peter Ball.

CONCLUSIONS OF LAW

1. Article V, Section 5(a) of the Covenants for Potowmack Preserve, Inc. provides that the maximum annual assessment “shall” be increased by the Board of Directors without a vote of the membership by the formula provided therein. This provision refers to the “maximum” as opposed to the “actual” annual assessment. The language does not leave an option not to increase the maximum. The language of Article V, Section 5(a) also provides that the maximum annual assessment “shall not be decreased by any decrease in the aforementioned Index.” The Panel reads this provision to require that the maximum annual assessment be

increased every year, whether or not the actual annual assessment is increased. For the years 2002 through 2005, the Board of Directors of Potowmack Preserve, Inc. did not expressly increase the maximum annual assessment as required by Article V, Section 5(a) of its Covenants. Commission Exhibit 1 at Page 57. Nevertheless, this is a harmless error, since the only action the Board needed to take was to make the arithmetical calculation each year and state what the maximum annual assessment would be. The Panel recognizes a distinction between what is the maximum annual assessment and the actual annual assessment, as did the Board itself when Lance Pelter, one of Peter Ball's witnesses, was on the Board. Consequently, the Panel concludes that the maximum annual assessment continued to grow in accordance with the formula of Article V, Section 5(a) of the Covenants. The Board had the authority therefore, without a vote of the members, to set an actual annual assessment at any figure equal to or less than the maximum annual assessment for fiscal year 2006, as increased from year to year in accordance within the formula in the covenants. Although the maximum annual assessment, or assessment ceiling, can increase from year to year, the Board of Directors retains the discretion to raise or lower the actual assessment charged in any year, depending upon its evaluation of the financial needs of the association.

2. Peter Ball, by his own admission and as established by the preponderance of the evidence, did not construct the architectural change that Potowmack Preserve, Inc. approved on July 22, 2003 pursuant to Mr. Ball's application dated May 27, 2003. Furthermore any architectural changes he did construct subsequent to May 2003, he constructed without the required approval. As of the date of the March 19, 2008 hearing, none of the architectural changes Peter Ball made to his property after May 27, 2003 were approved by Potowmack Preserve, Inc. Consequently all of those changes are in violation of the governing documents of

Potowmack Preserve, Inc.

3. Peter Ball's failure to construct the architectural change approved on July 22, 2003, his construction of other changes without prior approval, and his submission of incomplete plans for still other changes demonstrate an absence of good faith. It has been shown by a preponderance of the evidence that Mr. Ball has minimal regard for the covenants applicable to his property.

4. Article VIII, Section 9 of the By-law of Potowmack Preserve, Inc. provides for the award of litigation expenses as follows:

"Section 9. Litigation Expenses. Each owner of a dwelling or property who is a member of the Association, against whom any finding or conclusion is made in favor of the Association that a member has violated any of the By-laws, any of the covenants and Restrictions, or any of the rules implementing the By-laws or Declaration; or, against whom a final judgment or other final determination is made in favor of the Association in any court, administrative, or other action or proceeding in which enforcement of, damages for, or any other remedy for violation of any of the By-laws, any of the covenants and restrictions contained in the Declaration, or rules implementing the By-laws or Declaration is sought, shall pay all reasonable litigation expenses incurred by the Association in that action or proceeding, including taxable court costs, attorney fees, and all other litigation costs incurred by the Association in seeking enforcement of any of the covenants and restrictions contained in the Declaration; or in seeking to enforce a lien under Article III, Section 6 of the By-laws; or in seeking to recover any and all of these litigation expenses incurred by the Association."

The Panel concludes that it should interpret this Section as providing for the mandatory award of attorney's fees. Section 10B-13(d), Montgomery County Code, allows the Panel to award attorney's fees if an association document so requires and the award is reasonable under the circumstances. The Panel further concludes that at least \$3,200.00 of the legal fees incurred by Potowmack Preserve, Inc. relate directly to Case No. 720-G plus the filing fee of \$50.00 for the Complaint. The Panel declines to award legal fees for Case No. 33-06, since the Board neglected to state expressly the maximum annual assessment from year to year.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is as of the effective date of this decision

ORDERED:

1. Peter Ball's Complaint in Case No. 33-06 is dismissed with prejudice.
2. Potowmack Preserve, Inc. is awarded attorney's fees in the amount of \$3,200.00 and a refund of the filing fee in Case No. 720-G in the amount of \$50.00 against Peter Ball and Iryna Sivinska, jointly and severally. Peter Ball and Iryna Sivinska shall pay the sum of \$3250.00 to Potowmack Preserve, Inc. within 30 days after the effective date of this order. If the attorney's fees are not paid within that time, then Potowmack Preserve, Inc. may avail itself of any legal remedies or combination of legal remedies available to it to collect said fees, including but not limited to, if appropriate, filing a lien, initiating legal action, and any other remedy.
3. With respect to the architectural changes constructed by Peter Ball and Iryna Sivinska on their property at 10600 Vantage Court, Potomac, Maryland since May 27, 2003, all of those changes are in violation of the governing documents of Potowmack Preserve, Inc. Peter Ball and Iryna Sivinska are therefore ordered to remove all architectural changes to their property constructed since May 27, 2003 and to restore their property to the *status quo* immediately prior to May 27, 2003 within 30 days from the effective date of this order.
4. This order will be stayed temporarily if within 15 days from the effective date of this order Peter Ball and Iryna Sivinska file a complete application with Potowmack Preserve,

Inc. to construct architectural changes originally proposed in their May 27, 2003 application, Complainants' Exhibit 3. Said application shall include all of the information currently required by the governing documents of Potowmack Preserve, Inc., specifically by the Architectural Design Guidelines adopted by Potowmack Preserve, Inc. and admitted into the record as Complainants' Exhibit 19. Should they fail to file a complete application in accordance with all of the requirements of the Potowmack Preserve, Inc. governing documents within 15 days from the effective date of this order, then the stay will automatically terminate and all architectural changes must be removed in accordance with Paragraph 3 above within said original 30 days.

Peter Ball and Iryna Sivinska therefore have two options:

1. Restore their property to the *status quo* as of May 27, 2003 within 30 days; or
2. File a proper application for the "wood deck with shed roof on both sides of house; enclosed for a portion of new addition" within 15 days. They may not seek approval for any other architectural changes until the matter of the May 27, 2003 request for architectural change is resolved, either by removal of all architectural changes since May 27, 2003 or by approval of a proper application for the said changes under current association rules, and timely completion of those changes if they are approved.

4. Peter Ball and Iryna Sivinska may not file an application for any new architectural changes to their property until they have either restored their property to the *status quo* as of May 27, 2003 or obtained approval of a new application for the changes requested in their May 27, 2003 application, and timely completed those changes if they are approved.

5. Potowmack Preserve, Inc. shall review any application filed by Peter Ball and Iryna Sivinska pursuant to this order in good faith and promptly, and shall set a reasonable deadline for the completion of any changes approved.

6. If Peter Ball and Iryna Sivinska choose to file an application and if that application is denied, then upon said denial they must restore their property to the *staus quo* as of May 27, 2003 within 30 days from the effective date of denial by Potowmack Preserve, Inc.

7. Pursuant to Section 10B06.01.09 of the Code of Montgomery County Regulations (COMCOR), the Hearing Panel retains jurisdiction over this dispute for the purpose of assuring that the relief granted by the Hearing Panel is completed and in particular for the purpose of assuring that if Peter Ball and Iryna Sivinska file a timely application for a deck then the application is filed in accordance with the current applicable governing documents of Potowmack Preserve, Inc. and that said application is addressed by Potowmack Preserve, Inc. fairly, promptly and in good faith. Pursuant to COMCOR Section 10B06.01.09, the Hearing Panel reserves the authority to issue any further order that it deems necessary and proper to effect this decision and order.

The decision of the Hearing Panel is unanimous.

John F. McCabe, Jr., Panel Chair